



**FEDERAL ELECTION COMMISSION**  
WASHINGTON, D.C. 20463

**SEP 18 2010**

**Trevor Potter, Esq.**  
**Caplin & Drysdale**  
**One Thomas Circle, N.W. Suite 1100**  
**Washington, D.C. 20005**

**RE: MUR 6112**  
**John McCain 2008, Inc.**  
**and Joseph Schmuckler, in his official**  
**capacity as treasurer**

**Dear Mr. Potter:**

On November 3, 2008, the Federal Election Commission ("Commission") notified your clients, John McCain 2008, Inc. and Joseph Schmuckler, in his official capacity as treasurer, ("the Committee") of complaints alleging violations of the Federal Election Campaign Act of 1971, as amended ("the Act"). A copy of the complaint was forwarded to the Committee at that time.

Upon further review of the allegations contained in the complaints, and information supplied by your clients, the Commission, on August 24, 2010, found that there is reason to believe that the Committee accepted excessive contributions in violation of 2 U.S.C. § 441a(f), a provision of the Act, and authorized an audit pursuant to 2 U.S.C. § 437g. Also on this date, the Commission found no reason to believe that the Committee failed to disclose a \$56,047.00 contribution from Brian Medeska in violation of 2 U.S.C. § 434(b) and found no reason to believe that the Committee violated 2 U.S.C. § 432(c) by failing to properly account for the receipt of anonymous contributions and maintain identifying information for other contributors. The Factual and Legal Analysis, which formed a basis for the Commission's findings, is attached for your information.

You may submit any factual or legal materials that you believe are relevant to the Commission's consideration of this matter. Please submit such materials to the General Counsel's Office within 15 days of receipt of this letter. Where appropriate, statements should be submitted under oath. In the absence of additional information, the Commission may find probable cause to believe that a violation has occurred and proceed with conciliation.

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Please note that you have a legal obligation to preserve all documents, records and materials relating to this matter until such time as you are notified that the Commission has closed its file in this matter. See 18 U.S.C. § 1519.

If you are interested in pursuing pre-probable cause conciliation, you should so request in writing. See 11 C.F.R. § 111.18(d). Upon receipt of the request, the Office of the General Counsel will make recommendations to the Commission either proposing an agreement in settlement of the matter or recommending declining that pre-probable cause conciliation be pursued. The Office of the General Counsel may recommend that pre-probable cause conciliation not be entered into at this time so that it may complete its investigation of the matter. Further, the Commission will not entertain requests for pre-probable cause conciliation after briefs on probable cause have been mailed to the respondent.

Requests for extensions of time will not be routinely granted. Requests must be made in writing at least five days prior to the due date of the response and specific good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

This matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A) unless you notify the Commission in writing that you wish the matter to be made public.

If you have any questions, please contact Marianne Abely, the attorney assigned to this matter, at (202) 694-1650.

On behalf of the Commission,



Matthew S. Petersen  
Chairman

Enclosure  
Factual and Legal Analysis

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**FEDERAL ELECTION COMMISSION**

**FACTUAL AND LEGAL ANALYSIS**

**RESPONDENTS: John McCain 2008, Inc. and MUR 6112**  
**Joseph Schmuckler, in his official**  
**capacity as treasurer**

**I. INTRODUCTION**

This matter was generated by a complaint filed by the Democratic National Committee ("the complainant"). See 2 U.S.C. § 437g(a)(1).

The complainant alleges that John McCain 2008, Inc. and Joseph Schmuckler, in his official capacity as treasurer, ("Committee") violated the Federal Election Campaign Act of 1971, as amended, ("the Act") by accepting millions of dollars in excessive contributions, failing to disclose a \$56,047 individual contribution from Brian Medeska, and failing to properly account for the receipt of anonymous contributions and maintain identifying information for other contributors. 2 U.S.C. §§ 432(c), 434(b) and 441a(f).

The Committee denies violating the Act and urges the Commission to find that no violations occurred and dismiss the matter. According to the Committee, the complainant's allegations are groundless because they are based on information accessed from the campaign's searchable online database that temporarily contained inadvertent errors and did not show the results of its ongoing process of refinding, redesignating, and reattributing contributions.

**II. FACTUAL AND LEGAL ANALYSIS**

**A. RECEIPT OF EXCESSIVE CONTRIBUTIONS**

**1. Factual Summary**

The Committee was the principal campaign committee for presidential candidate John McCain during the 2008 primary election cycle. The Committee raised over \$246,117,990.70 in contributions for the primary election, which it disclosed in reports filed with the Commission. In addition to filing disclosure reports with the Commission, the Committee voluntarily disclosed contributions to the public through a searchable database on its campaign website, www.JohnMcCain.com, called the Primary Election Donor Lookup Archive ("Donor Archive"). The Donor Archive listed contributions received exclusively during the primary election period because John McCain's general election committee, McCain-Palin 2008, Inc., participated in the presidential public funding program and did not raise private contributions after August 31, 2008. See 2 U.S.C. § 9031.

Based on a review of the Donor Archive, performed between October 18, 2008 and October 20, 2008, the complainant alleges that the Committee violated the Act by accepting excessive contributions totaling nearly \$7 million. 2 U.S.C. § 441a(f). Specifically, the complainant alleges that the Committee accepted 6,653 contributions that were at least \$1,000 in excess of the \$2,300 limit for the primary election, and may have accepted additional excessive contributions that it failed to disclose. According to the complainant, nineteen of these individuals listed contributed more than \$10,000 each to the Committee. One of these individuals, Brian Medeska, allegedly made a \$56,047 contribution to the Committee, which the campaign failed to report on any of its

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1 disclosure reports in violation of the Act. 2 U.S.C. § 434(b).<sup>1</sup> Although the complainant  
2 primarily used the voluntary Donor Archive as the basis for its allegations relating the  
3 Committee's acceptance of excessive contributions, the complainant also appears to have  
4 reviewed one of the ten RFAs received by the campaign as of October 2008 relating to  
5 the acceptance of excessive contributions, and cites to it to demonstrate the Committee's  
6 "extensive recent history of flouting" FECA. This RFA, dated September 30, 2008,  
7 included a nine-page list of apparent excessive contributions disclosed in the  
8 Committee's M8 Report.

9 The Committee denies that it accepted any excessive contributions in violation of  
10 the Act. The Committee states that the Donor Archive experienced a data entry problem  
11 in October 2008 resulting in the complainant downloading inaccurate contribution  
12 information. The response also states that, because the Donor Archive was updated once  
13 a month, it only provided a static view of the campaign's contribution processing.  
14 According to the Committee, this resulted in the Donor Archive listing some contributors  
15 as having given over the \$2,300 limit even though these contributors received refunds or  
16 authorized redesignations or reattributions within the 60-day deadline. Further, the  
17 Committee contends that the complainant's reliance on the Donor Archive, which is a  
18 voluntary and unofficial database of information, is insufficient to establish that the  
19 campaign actually accepted excessive contributions in violation of the Act.

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<sup>1</sup> The complaint appears to have erroneously cited 2 U.S.C. § 434(a) in connection with Committee's failure to report the \$56,047.00 contribution. Section 434(a) governs the filing of disclosure reports by committee treasurers. Given that the complainant's allegation relates to the failure to disclose an individual contribution in excess of \$200, the Commission analyzed this issue under 2 U.S.C. § 434(b), which governs the contents of disclosure reports, including the itemization of contributions in excess of \$200. 2 U.S.C. § 434(b)(3)(A).

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1 The Commission reviewed the Committee's disclosure reports for the 2008  
2 primary election cycle, which reflected that the Committee received a total of  
3 \$5,716,260.80 in apparent excessive contributions during the primary election cycle,  
4 which were not refunded, redesignated or reattributed in a timely manner.<sup>2</sup> See Chart  
5 below.

REPORT	OUTSTANDING EXCESSIVES		TOTAL CONTRIBUTIONS
2006 YE	\$8,000.00	of	\$1,710,387.41
2007 Q1	\$59,225.00	of	\$13,025,695.50
2007 Q2	\$52,250.00	of	\$36,212,773.86
2007 Q3	\$14,875.00	of	\$5,698,139.82
2007 YE	\$13,550.00	of	\$6,836,072.13
2008 M2	\$11,119.00	of	\$11,730,045.17
2008 M3	\$22,310.00	of	\$11,014,611.37
2008 M4	\$121,419.00	of	\$15,192,499.28
2008 M5	\$238,705.00	of	\$17,967,511.38
2008 M6	\$492,657.68	of	\$20,888,390.64
2008 M7	\$549,413.00	of	\$21,507,299.08
2008 M8	\$429,896.00	of	\$26,256,338.97
2008 M9	\$428,961.97	of	\$47,565,861.84
2008 M10	\$2,794,263.15	of	\$8,206,102.52
2008 12G <sup>3</sup>	\$145,718.00	of	\$792,825.96
2008 30G	\$333,898.00	of	\$1,513,435.67
<b>TOTAL</b>	<b>\$5,716,260.80</b>	<b>of</b>	<b>\$246,117,990.70</b>

<sup>2</sup> The Commission identified \$2,794,263.15 in potential excessive contributions based on the M10 Report, which included \$7,300.00 in excessive contributions from one individual and one political action committee that were not timely refunded, redesignated, or reattributed, plus \$2,786,963.15 in contributions designated for the 2008 primary election that were reportedly received after the date of the candidate's nomination. A subsequent review of the Committee's disclosure reports, as well as reports of various joint fundraising committees in which the Committee participated, indicates that approximately \$2,238,783.99 of these "primary-after-primary" funds appear to have been received by the various joint fundraisers before the candidate's nomination, and the Committee reported the dates the funds were transferred from the joint fundraising committees, rather than the dates the funds were received by the joint fundraisers as the contribution date. Therefore, the \$2,238,783.99 in contributions might not be excessive, but simply disclosed incorrectly by the Committee. Similarly, a review of the disclosure reports filed by the McCain-Palin Compliance Fund, Inc. ("GELAC") appears to indicate that the GELAC received \$13.78 million in redesignations from the Committee starting in the M2 reporting period. Of that amount, it appears that up to approximately \$2,101,604.33 in redesignated primary excessive contributions may overlap with the excessive contributions identified in the chart on this page. Therefore, up to an additional \$2,101,604.33 in contributions might not be excessive, but may have been reported incorrectly by the Committee.

<sup>3</sup> The excessive contributions listed for both the 2008 12G and 2008 30G reporting periods are largely "primary-after-primary" contributions. There are no joint fundraising transfers disclosed on these reports.

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1           Thus, it appears from the Committee's disclosure reports that it accepted  
2 excessive contributions.

3                   2.     Legal Analysis

4           The Act provides that no person shall make contributions to a candidate for  
5 federal office or his authorized political committee, which in the aggregate exceed \$2,300  
6 for the primary and general elections, respectively. 2 U.S.C. § 441a(a)(1)(A). The  
7 Committee's aggregate total of permissible contributions \$4,600, which includes the  
8 permissible amount of \$2,300 for the primary election and an additional \$2,300 deposited  
9 into the McCain-Palin Compliance Fund, Inc. ("GELAC"). Contributions in excess of  
10 the \$2,300 limit for the presidential primary election may only be deposited into the  
11 GELAC if they are made for the primary, exceeded the contributor's contribution limits  
12 for the primary and are lawfully redesignated for the GELAC pursuant to 11 C.F.R.  
13 § 110.1. See 11 C.F.R. § 9003.3(a)(1). In addition, candidates and political committees  
14 are prohibited from knowingly accepting contributions in violation of the contribution  
15 limits set forth in the Act. 2 U.S.C. § 441a(f).

16           Based upon the available information, the Committee appears to have accepted  
17 excessive contributions that range from \$3.5 million to \$5.7 million. Accordingly, the  
18 Commission finds reason to believe that John McCain 2008, Inc. and Joseph Schmuckler,  
19 in his official capacity as treasurer, accepted excessive contributions in violation of  
20 2 U.S.C. § 441a(f).

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**B. FAILURE TO DISCLOSE A \$56,047 CONTRIBUTION**

**1. Factual Summary**

The complainant alleges that the Committee accepted an excessive contribution totaling \$56,047 from Brian Medeska of Farmington, Connecticut, which it failed to disclose in any of the reports it filed with the Commission.<sup>4</sup> The complainant states that it discovered Mr. Medeska's contribution during its analysis of information posted on the Donor Archive.

The Committee denies that Mr. Medeska made an excessive contribution to the campaign and attributes the identification of a \$56,047.00 contribution from Mr. Medeska in the Donor Archive to the database errors described *supra* at 3. According to the Committee, Brian Medeska of Farmington, Connecticut actually contributed a total of \$75 to the campaign; \$25 on August 9, 2007 and \$50 on January 31, 2008. In support, the Committee provides what it terms a "Contribution Report" generated from the Donor Archive listing Mr. Medeska's two contributions. This report includes Mr. Medeska's city, state, zip code, address, as well as the amount of and donation date for each contribution.

**2. Legal Analysis**

Treasurers of a political committee are required to file reports of receipts and

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<sup>4</sup> The Committee did not report any contributions from Brian Medeska of Farmington, Connecticut in its FEC disclosure reports.



1 disbursements in accordance with the provisions of 2 U.S.C. § 434(a).<sup>5</sup> Authorized  
2 committees of a candidate for federal office are required to disclose the total amount of  
3 receipts received during the reporting period, including contributions from individuals.  
4 2 U.S.C. § 434(b); 11 C.F.R. § 104.3(a). Such committees are also required to itemize  
5 contributions aggregating in excess of \$200 per election cycle and disclose the  
6 identification of the contributor. 2 U.S.C. § 434(b)(3)(A); 11 C.F.R. § 104.3(a)(4). This  
7 identification includes the contributor's name, address, occupation, the name of his or her  
8 employer, if any, and the date of receipt and amount of the contribution.  
9 2 U.S.C. §§ 431(13), 434(b)(3)(A); 11 C.F.R. § 100.12, 104.3(a)(4).

10 The available information in this matter does not support a finding that the  
11 Committee may have accepted a \$56,047 contribution from Brian Medeska of  
12 Farmington, Connecticut that it failed to disclose to the Commission in violation of  
13 2 U.S.C. § 434(b). The Committee presented information explaining that the database  
14 errors resulted in the complainant accessing inaccurate contribution information for Mr.  
15 Medeska. In addition, the Committee's "Contribution Report" provided specific  
16 information regarding two contributions, totaling \$75, made by Brian Medeska of  
17 Farmington, Connecticut. The Commission has no information to the contrary. Given  
18 that the aggregate amount of those contributions did not meet the \$200 threshold, the

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<sup>5</sup> In any calendar year during which a general election is held, the principal campaign committee of a presidential candidate is required to file monthly reports if the campaign has on January 1 of such year, received contributions aggregating \$100,000 or made expenditures aggregating \$100,000 or anticipates receiving contributions aggregating \$100,000 or making expenditures aggregating \$100,000 during such year. 2 U.S.C. § 434(a)(3)(A). In any other calendar year, the treasurer shall file monthly reports, which shall be filed no later than the 20<sup>th</sup> day after the last day of each month and shall be complete as of the last day or the month; or quarterly reports, which shall be filed no later than the 15<sup>th</sup> day after the last day of each calendar quarter and which shall be complete as of the last day of each calendar year. 2 U.S.C. § 434(a)(3)(B).

1 Committee was not required to itemize Mr. Medeska's contributions on any of its  
2 disclosure reports. 2 U.S.C. § 434(b)(3)(A); 11 C.F.R. § 100.12, 104.3(a)(4).

3 Accordingly, the Commission finds no reason to believe that John McCain 2008,  
4 Inc. and Joseph Schmuckler, in his official capacity as treasurer, failed to disclose a  
5 \$56,047.00 contribution from Brian Medeska in violation of 2 U.S.C. § 434(b).

6 **C. VIOLATIONS OF THE RECORDKEEPING REQUIREMENTS**

7  
8 **1. Factual Summary**

9 The complainant alleges that the Committee violated the Act by failing to  
10 properly account for the receipt of anonymous contributions and maintain identifying  
11 information for other contributors.<sup>6</sup> Based on information accessed from the Donor  
12 Archive on October 23, 2008, the complaint alleges that the Committee violated the Act  
13 by accepting 23 anonymous contributions exceeding \$50 and failing to maintain the  
14 names and addresses of those contributors. According to the complainant, these  
15 anonymous contributions, which were apparently received between August 11, 2008 and  
16 August 31, 2008, totaled \$3,042.

17 The complaint also alleges that the Committee failed to properly maintain the  
18 addresses or other identifying information for numerous other contributors. By treating  
19 donations with identical names, states and zip codes as having been given by the same  
20 person, the complainant concluded that the Committee accepted 94 contributions totaling  
21 \$23,614.00 from individuals for whom no street address was provided. According to the

<sup>6</sup> Although the complainant concludes that the Committee's failure to maintain this contributor information violated 2 U.S.C. § 432(b), as discussed below, these allegations are more appropriately analyzed as a potential violation of 2 U.S.C. § 432(c).

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1 complaint, 46 of these contributions were over \$50.<sup>7</sup> The complainant further asserts that  
2 it is impossible to identify another 94 contributions, totaling \$10,000, listed in the Donor  
3 Archive during this same time period because the contributor for each is listed with a last  
4 name and (partial) address, but no first name. The complainant reached this conclusion  
5 by treating donations with identical last names, states and zip codes as having been given  
6 by the same person. The complaint states that 20 of these contributions were over the  
7 \$50 limit.<sup>8</sup>

8 The Committee states that it appropriately disbursed anonymous contributions  
9 over \$50 to charity in accordance with 11 C.F.R. § 110.4(c)(3), which requires that such  
10 contributions be promptly disbursed for any lawful purpose unrelated to any federal  
11 election, campaign or candidate. 11 C.F.R. § 110.4(c)(3). As evidence of its proper  
12 disposal of these funds, Committee provided a list of 11 checks issued to Operation Smile  
13 and the American Heart Association between June 30, 2007 and November 28, 2008.  
14 The list, which did not include the amount of each check, provided the name and address  
15 of the charity as well as the check number and date of issuance.

16 The Committee explains that it exercised its "best efforts" to find missing  
17 contributor information in accordance with the requirements of 11 C.F.R. § 104.7(b).  
18 According to the Committee, its "best efforts" processes included requesting  
19 contributors' personal information in campaign solicitations and making continual efforts  
20 to find missing contributor information. In support, the Committee provided a copy of its

<sup>7</sup> A review of the list provided by the complainant indicates that the 94 contributions were made by 38 individual donors, 27 of whom appear to have contributed over \$50. Approximately 15 of these individual donors with incomplete address information appear to have contributed over \$200.

<sup>8</sup> A review of the list provided by the complainant indicates that the contributions at issue were made by 49 individuals, 33 of whom appear to have contributed over \$50.

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1 on-line solicitation to the McCain-Palin GELAC, which requested all identifying  
2 information required by the Act and clearly informed contributors that Federal law  
3 required the campaign to collect and report the name, mailing address, occupation, and  
4 name of employer of individuals whose contributions exceed \$200 in an election cycle.  
5 The Committee also furnished a sample follow-up letter, which it states was sent to any  
6 individual donor who failed to provide complete identifying information at the time of  
7 the contribution. In addition, the Committee states that the campaign searched for  
8 mining contributor information in phone directories, web sites and other online  
9 databases. According to the Committee, these "best efforts" processes resulted in the  
10 campaign identifying 44 out of the 49 contributors identified by the complainant as  
11 missing a first name.

12 **2. Legal Analysis**

13 The treasurer of a political committee is required to keep a record of "the name  
14 and address of any person who makes any contribution in excess of \$50, together with the  
15 date and amount of such contribution . . . ." <sup>9</sup> 2 U.S.C. § 432(c)(2), 11 C.F.R.  
16 § 102.9(a)(1). For contributions aggregating in excess of \$200 during a calendar year,  
17 treasurers are required to obtain and preserve the identification of the person in  
18 accordance with 11 C.F.R. § 100.12, as well as the date of receipt and amount of such  
19 contribution. 2 U.S.C. § 432(c)(3); 11 C.F.R. § 102.9(a)(2). In performing

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<sup>9</sup> The Commission's regulations require that records shall be kept by any reasonable accounting procedure of all contributions received by or on behalf of a political committee. 11 C.F.R. § 102.9(a). The Commission has recommended that reasonable accounting procedures for contributions of \$50 or less may include keeping the same information required for identifying contributions that exceed \$50, which includes the amount, date of receipt, and donor's name and address or in the case of small contributions collected at a fundraiser, such as gate receipts and cash contributions, records of the name of the event, the date and the total amount of contributions collected. See Advisory Opinions 1981-48 (Monteagan County Republican Party) and 1989-99 (Republican Roundup Committee).

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1 recordkeeping duties, the treasurer or his agent shall use his "best efforts" to obtain,  
2 maintain and submit the required information. 11 C.F.R. § 102.9(d). If there is a  
3 showing that best efforts have been made, any records of a committee shall be deemed to  
4 in be compliance with the Act. *Id.*; 2 U.S.C. § 432(i).

5 A political committee receiving an anonymous cash contribution in excess of  
6 \$50.00 is required to "promptly dispose of the amount over \$50." The amount over \$50  
7 may then be used for any lawful purpose unrelated to Federal elections, campaigns or  
8 candidates. 11 C.F.R. § 110.4(c)(3). The Commission has advised political committees  
9 that if the identity of a contributor cannot be determined or is in question, appropriate  
10 disbursement of the funds would include giving the funds to a governmental entity  
11 (federal, state or local) or a qualified charitable organization as described in 2 U.S.C.  
12 § 170(c). See Advisory Opinion 1991-39 (D'Amato)(contributions from unidentified  
13 contributors should be disbursed by the committee for any lawful purpose unrelated to a  
14 federal election, campaign or candidate).

15 Based on the available information, it does not appear that the Committee violated  
16 its recordkeeping obligations by failing to properly account for the receipt of anonymous  
17 contributions and maintain identifying information for other contributors. 2 U.S.C.  
18 § 432(c). First, there is no information to suggest that the Committee utilized the Donor  
19 Archive for the purpose of complying with its recordkeeping obligations under the Act or  
20 Commission regulations. Second, it appears that the Committee disposed of the 23  
21 anonymous contributions at issue in accordance with the Commission's regulations.  
22 The Committee's disclosure reports indicate that the committee made a total of nineteen  
23 disbursements totaling \$24,622.58 to the American Heart Association and Operation

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1 Smile between June 30, 2007 and December 30, 2008, including a \$3,542.50  
2 disbursement to the latter charity on October 16, 2008. 11 C.F.R. § 110.4(c)(3).

3 Further, the Committee presents information and documents indicating that its  
4 response to missing contributor information was consistent with the "best efforts" safe  
5 harbor, such as requesting complete contributor identification information in its  
6 solicitation materials with an accurate statement of the appropriate Federal law,  
7 requesting information through follow-up correspondence, and by searching publicly  
8 available information for missing names or addresses. 11 C.F.R. § 104.7(b); 2 U.S.C.  
9 § 432(i). And, although the Committee did not discuss specific efforts it may have  
10 employed to locate complete addresses for the contributors identified by the complainant,  
11 the campaign did provide a list demonstrating its success in finding the first names for a  
12 majority of the contributors identified by the complainant as lacking that information.

13 Accordingly, the Commission finds no reason to believe that John McCain 2008,  
14 Inc. and Joseph Schmuckler, in his official capacity as treasurer, violated 2 U.S.C.  
15 § 432(c) by failing to properly account for the receipt of anonymous contributions and  
16 maintain identifying information for other contributors.

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